No. 05-848
Title: Environmental Defense, et al., Petitioners
v.
Duke Energy Corporation et al.
Docketed: January 5, 2006
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (04-1763)
Decision Date: June 15, 2005
Rehearing Denied: August 30, 2005
Questions Presented

Date	Proceedings and Orders
Nov 15 2005	Application (05A441) to extend the time to file a petition for a writ of certiorari from November 28, 2005 to January 12, 2006, submitted to The Chief Justice.
Nov 17 2005	Response to application from respondent Duke Energy Corporation filed.
Nov 17 2005	Application (05A441) granted by The Chief Justice extending the time to file until December 28, 2005.
Dec 28 2005	Petition for a writ of certiorari filed. (Response due February 6, 2006)
Jan 31 2006	Order extending time to file response to petition to and including March 8, 2006, for all respondents.
Mar 7 2006	Brief amici curiae of New York, et al. filed.
Mar 8 2006	Brief of respondent United States in opposition filed.
Mar 8 2006	Brief of respondent Duke Energy Corporation in opposition filed.
Mar 8 2006	Brief amici curiae of National Parks Conservation Association, et al. filed.
Mar 21 2006	Reply of petitioners Environmental Defense, et al. filed. (Distributed)
Mar 22 2006	DISTRIBUTED for Conference of April 14, 2006.
Apr 17 2006	DISTRIBUTED for Conference of April 21, 2006.
Apr 24 2006	DISTRIBUTED for Conference of April 28, 2006.
May 8 2006	DISTRIBUTED for Conference of May 11, 2006.
May 15 2006	Petition GRANTED.
May 22 2006	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including July 21, 2006.
Jun 5 2006	Consent for the filing of amicus briefs in support of either/neither party received from counsel for the respondent.
Jun 5 2006	Extension of time within which to file the respondent's brief on the merits to and including September 15, 2006.
Jul 5 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Jul 21 2006	Brief amici curiae of Chesapeake Bay Foundation and Adirondack Mountain Club filed.
Jul 21 2006	Brief amici curiae of STAPPA and ALAPCO
Jul 21 2006	Brief amici curiae of New Jersey, et al. filed.
Jul 21 2006	Brief of respondent United States in support filed.
Jul 21 2006	Joint appendix filed. (Joint appendix in two volumes).
Jul 21 2006	Brief of petitioners Environmental Defense, et al. filed.

Jul 21 2006	Brief amici curiae of Law Professors John E. Bonine, et al. filed.
Jul 21 2006	Brief amici curiae of New York, et al. filed.
Jul 21 2006	Brief amici curiae of American Lung Association, et al. filed.
Jul 21 2006	Brief amici curiae of National Parks Conservation Association, et al. filed.
Jul 21 2006	Brief amici curiae of Former EPA Administrators Carol M.Browner and Russell E. Train filed.
Jul 21 2006	Brief amici curiae of Current and Former Members of Congress Henry Waxman, et al. filed.
Aug 14 2006	SET FOR ARGUMENT on Wednesday, November 1, 2006.
Aug 14 2006	CIRCULATED.
Sep 15 2006	Brief amicus curiae of Manufacturers Aassociation Work Group filed. (Distributed)
Sep 15 2006	Motion of Alabama, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Sep 15 2006	Brief of respondent Duke Energy Corporation filed. (Distributed)
Sep 15 2006	Brief amici curiae of Alabama, et al. filed. (Distributed)
Sep 15 2006	Brief amicus curiae of Electric Utility Industry filed. (Distributed)
Sep 15 2006	Brief amicus curiae of APA Watch filed. (Distributed)
Sep 15 2006	Brief amicus curiae of National Environmental Development Association filed. (Distributed)
Sep 15 2006	Brief amicus curiae of Walter C. Barber filed. (Distributed)
Sep 15 2006	Brief amicus curiae of U.S. Representative Joe L Barton filed. (Distributed)
Sep 15 2006	Brief amici curiae of International Brotherhood of Boilermakers, et al. filed. (Distributed)
Sep 15 2006	Brief amici curiae of American Public Power Association and National Rural Electric Cooperative Association filed. (Distributed)
Sep 15 2006	Brief amicus curiae of Washington Legal Foundation filed. (Distributed)
Sep 15 2006	Brief amici curiae of Law Professors filed. (Distributed)
Sep 18 2006	Motion for divided argument filed by the Solicitor General.
Sep 18 2006	Petitioners' response to motion of Alabama, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Sep 22 2006	DISTRIBUTED for Conference of September 25, 2006.
Sep 28 2006	Record received from U.S.C.A. for 4th Circuit. (1 box)
Oct 2 2006	Motion of Alabama, et al. for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Oct 2 2006	Motion for divided argument filed by the Solicitor General GRANTED.
Oct 10 2006	Record received from U.S.D.C. for Middle District of North Carolina (Greensboro) (6 boxes)
Oct 19 2006	Reply of petitioners Environmental Defense, et al. filed. (Distributed).
Oct 20 2006	Reply of United States as respondent supporting peittioners filed. (Distributed).
Oct 27 2006	Petitioner's proposed lodging approved and filed (20 copies each of the brief of Industry Petitioners, settlement agreement, and certified CA-4 transcript). DISTRIBUTED.
Nov 1 2006	Argued. For petitioners: Sean H. Donahue, Washington, D.C. For respondent United States in support of petitioners: Thomas G. Hungar, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent Duke Energy Corporation: Carter G. Phillips, Washington, D.C.

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 05-___

IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORP., ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this civil enforcement action under the Clean Air Act, the Fourth Circuit ruled that EPA's definition, embodied in a 1980 regulation, of emissions "increases" for purposes of the Prevention of Significant Deterioration (PSD) program violates the Act because it differs from a regulatory definition EPA employs to measure emissions increases under another program under the Act, the New Source Performance Standards (NSPS). Both the court's holding and its analysis of the statute conflict with decisions of other courts, including a decision rendered by the D.C. Circuit rejecting challenges to the very regulations at issue in this case, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). The questions presented are:

1. Whether the Fourth Circuit's decision violated Section 307(b) of the Act, which provides that national Clean Air Act regulations are subject to challenge "only" in the D.C. Circuit by petition for review filed within 60 days of their promulgation, and "shall not be subject to judicial review" in enforcement proceedings, 42 U.S.C. 7607(b); and

2. Whether the Act's definition of "modification," which turns on whether there is an "increase" in emissions and which applies to both the NSPS and PSD programs, rendered unlawful EPA's longstanding regulatory test defining PSD "increases" by reference to actual, annual emissions.

PARTIES TO THE PROCEEDINGS

Plaintiff the United States, and plaintiffs-intervenors Environmental Defense, North Carolina Sierra Club, and North Carolina Public Interest Research Group Citizen Lobby/Education Fund were appellants in the court of appeals. Defendant Duke Energy Corporation was appellee in the court of appeals.

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OPINIONS BELOW

The opinion of the district court is reported at 278 F. Supp. 2d 619 and is reproduced in the Appendix ("App.") at page 22a. That court's order granting summary judgment is unreported and is reproduced at App. 85a. The court of appeals' order requesting supplemental briefing is reprinted at App. 21a, and its opinion is published at 411 F.3d 539 and reproduced at App. 1a. The court of appeals' unreported order denying rehearing en banc is reproduced at App. 20a.

JURISDICTION

The district court's jurisdiction was based upon 28 U.S.C. 1331. The court of appeals had appellate jurisdiction based on 28 U.S.C. 1291. The scope of both courts' jurisdiction was limited by 42 U.S.C. 7607(b).

The court of appeals entered judgment on June 15, 2005, and denied petitioners' and the United States' petitions for rehearing en banc on August 30, 2005. On November 17, 2005, the Chief Justice extended the time for petitioners to file a petition for certiorari to December 28, 2005. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Clean Air Act (CAA) defines a "modification" for purposes of the New Source Performance Standards (NSPS) and Prevention of Significant Deterioration (PSD) programs as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source[.]" 42 U.S.C. 7411(a), 7949(2)(C). Section 307(b), 42 U.S.C. 7607(b), provides that judicial review of "nationally applicable regulations" under the Act may be had "only" by petition for review in D.C. Circuit filed with 60 days of promulgation, and that such regulations and "any other final action" subject to such review "shall not be subject to judicial review" in enforcement proceedings. These and other relevant provisions

of the Act and its implementing regulations are reproduced at App. 96a-106a.

INTRODUCTION

In this Clean Air Act enforcement action, the Fourth Circuit set aside, as contrary to the statute, EPA's regulatory test, embodied in regulations adopted in 1980, defining an "increase" in emissions for purposes of the Act's PSD program. In so doing, the court contravened Section 307(b) of the Act, which expressly confines challenges to national CAA regulations to petitions for review filed in the D.C. Circuit within 60 days, and which expressly forbids such challenges in enforcement proceedings.

Nine days after the Fourth Circuit's decision, the D.C. Circuit denied petitions for review brought by an industry coalition (including respondent Duke Energy) challenging the very 1980 regulation that was held contrary to statute by the Fourth Circuit here. *New York v. Environmental Protection Agency*, 413 F.3d 3 (D.C. Cir. 2005). In that decision, the D.C. Circuit found that the industry petitioners had waived the statutory theory adopted by the Fourth Circuit here, and it rejected a related statute challenge that was made to the 1980 PSD regulations attacking EPA's emissions "increase" test as contrary to the statutory definition of modification. *New York* also held, contrary to the decision here, that the CAA's PSD provisions not only permit, but compel, an "actual emissions" test for PSD modifications. The Fourth Circuit's reading of the Act thus directly conflicts with that of the court whose exclusive jurisdiction it invaded.

The Fourth Circuit reasoned that EPA's "actual annual emissions" test for PSD emissions increases is unlawful because the CAA uses the same definition of "modification" for PSD and for the separate NSPS program, for which EPA has a different test of emissions "increases." The court based this decision on what it called an "effectively irrebuttable" presumption that identical *statutory* definitions governing two different CAA programs require that *regulations*

implementing component terms in those statutory definitions themselves be "identical." That ruling, however, rested on a grave misreading of this Court's tax decision, *Rowan Companies, Inc. v. United States*, 452 U.S. 257 (1981); disregarded this Court's repeated instructions on statutory construction; overlooks marked differences between the NSPS and PSD programs; is directly contrary to decisions of the D.C. Circuit and other courts of appeals, and disregards this Court's basic teachings on statutory interpretation.

This case is exceptionally important to the integrity and stability of the jurisdictional regime established in the CAA (and virtually every other major environmental statute) and to the administration of one of the most broadly applicable programs established by Congress to protect and enhance the nation's air quality. It merits this Court's review.

STATEMENT OF THE CASE

Statutory and Regulatory Background. Congress enacted the Clean Air Act amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b). The Act assigns EPA the responsibility to adopt implementing regulations and to enforce the statute in tandem with the states, *e.g.*, *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) (*ADEC*).

In order to promote the "even and consistent national application" of EPA's implementing regulations, S. Rep. No. 91-1196, at 40-41 (1970), Congress in Section 307(b) directed that petitions for review of nationally applicable CAA regulations may be filed only in the D.C. Circuit, within 60 days of promulgation, and that suits to review other final actions of regional or local application be brought only in the appropriate regional courts of appeals, 42 U.S.C. 7607(b). See *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978). Section 307(b)(2) provides that "[a]ction of the Administrator

with respect to which review could have been obtained [by such petition for review] shall not be subject to judicial review in civil or criminal proceedings for enforcement." Section 307(e) provides "[n]othing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section." 42 U.S.C. 7607(e).

The 1970 legislation directs EPA to develop national technology-based standards intended to "force" the development of new and better control technologies. See *Union Elec. v. EPA.*, 427 U.S. 246, 257 (1976). The New Source Performance Standards ("NSPS") require new and "modified" sources to meet technology-based standards developed by EPA and applicable to entire categories of equipment. 42 U.S.C. 7411. "Modification," for purposes of that program, is defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source[.]" *Id.* 7411(a). The CAA also directs EPA to establish National Ambient Air Quality Standards (NAAQS) for air pollutants at a level requisite to protect human health and the environment, 42 U.S.C. 7409. States are authorized to establish state implementation plans to achieve and maintain the NAAQS. *Id.* 7410.

In 1977, Congress comprehensively amended the Act. Among this "lengthy, detailed, technical, complex and comprehensive response to a major social issue," *Chevron USA, Inc. v. Natural Resource Defense Council,* 467 U.S. 837, 848 (1984), the 1977 amendments introduced a statutory Prevention of Significant Deterioration ("PSD") program, 42 U.S.C. 7470-7479, "designed to ensure that the air quality in attainment areas or areas that are already 'clean' will not degrade." *ADEC*, 540 U.S. at 470-71 (citation and internal quotation marks omitted); see 42 U.S.C. 7470(1) (PSD intended to "insure that economic growth would occur in a manner consistent with the preservation of existing clean air resources"). States manage increments – caps on permissible